United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1950

No. 486

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,
vs.
MICHIGAN PUBLIC SERVICE COMMISSION and
MICHIGAN CONSOLIDATED GAS COMPANY,
Appellees

APPEAL FROM THE SUPREME COURT OF THE
STATE OF MICHIGAN

BRIEF FOR APPELLEE, MICHIGAN CONSOLIDATED GAS COMPANY

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JURISDICTION

The decree of the Supreme Court of Michigan, from which this appeal is taken, affirmed an order of the Michigan Public Service Commission directing appellant to

> "cease and desist from making direct sales and deliveries of natural gas to industries within the State

> of Michigan, located within municipalities already being served by a public utility, until such time as it shall have first obtained a certificate of public convenience and necessity from this Commission to perform such services." (R. 32)

Appellant made no effort to comply with this order. Instead it instituted this litigation, seeking to set aside and nullify the order.

This appellee in due course filed in this Court a statement opposing jurisdiction on the ground that the decree of the Michigan Supreme Court upholding the Commission's order was not a final judgment or decree upon which an appeal could be based. The arguments presented in this statement constitute Part I of this brief.

STATEMENT OF FACTS

The facts as set forth in appellant's brief are, with one minor exception noted below, substantially in accordance with the record. We would like to add to them certain omissions which we consider material.

On page 3 of appellant's brief it is stated, "Panhandle also offered to sell natural gas direct to several other industrial consumers in Michigan." We believe this should be amplified.

The proposal of appellant to sell natural gas directly to the Ford Motor Company is not to be viewed as an isolated transaction. Early in 1945 the appellant announced a general program of selling gas direct "to large industrial customers in and around Detroit" (R. 239-245, 197-199, 207-209). It was an avowed part of this program to secure this large industrial business by offering the gas at rates below those fixed by the Michigan Public Service Commis-

sion for service to such industries by the Michigan Consolidated Gas Company, which was then serving them (R. 242). In February of that year Mr. W. G. Maguire, Chairman of the Board of appellant, advised the Mayor of the City of Detroit by letter of this program and stated as follows:

> "This can be done through the direct sale of gas on an interruptible basis to large industrial customers in and around Detroit. In this connection Panhandle Eastern stands ready and willing to pay the City of Detroit a proper consideration for the right to lay and operate its pipe line along the streets and alleys of Detroit to the plants of such large industrial customers. Natural gas fuel would be made available to such industries at very favorable rates compared with those prevailing at Detroit now." (R. 241)

At a subsequent meeting of the Detroit Common Council held the same month, at which this letter was read, Mr. Maguire stated further:

> "In addition to what I have already said, Panhandle is ready, able and desirous of selling gas to your industries directly at a lower price than they are now paying, and in addition to pay to the City of Detroit a reasonable rental for the use of any streets necessary for crossings or rights of way. To this end we are ready to sit down with representatives of your city and of local industries to work out a program for the post-war period." (R. 242)

Other representatives of Panhandle testified both before the Detroit Common Council and the Federal Power Commission that it was that company's avowed policy to obtain at any place on or adjacent to its system as much direct industrial gas as it could (R. 245, 274).

Michigan Consolidated purchases a large part of the natural gas it distributes in the Detroit District from Panhandle under a contract calling for deliveries up to 125,000,000 cubic feet per day (R. 260, 396). At the time Panhandle entered into its contract with Ford Motor Company for direct service, the Ford company was, and for some time had been, a large industrial customer of Michigan Consolidated (R. 261). Prior to that time Michigan Consolidated had endeavored to secure increased deliveries of gas from Panhandle for its customers in the Detroit District, including the Ford company, but all such requests were ignored by Panhandle (R. 160).

Under the proposed plan of delivery to the Ford Motor Company, appellant's main 22-inch transmission line carrying its gas into this state would be tapped, and a 12¾-inch line would be run about 18 feet, dividing at that point into three delivery lines (R. 293). A meter and a regulator would be installed on each of the three delivery lines so that gas could be delivered to the Ford Motor Company simultaneously at three different pressures, if that company so desired (R. 294). Pressure of 600 pounds in the main transmission line would be reduced to about 100 pounds by the regulators (R. 293).

The statement in appellant's brief (first full paragraph on page 5) that the trial court held that "a sale to a direct industrial customer was subject to State regulation on rates" is in error. The Circuit Court made no such finding (R. 306-311). What the Court did hold was that such a sale constitutes interstate commerce and "is not amenable to local regulation" (R. 311).

SUMMARY OF ARGUMENT

It is apparent from the record in this case that appellant, prior to the decision of this Court in *Panhandle Eastern Pipe Line Co. v. Indiana Public Service Commission*, 332 U. S. 507, contended consistently throughout that part of the litigation that by reason of the Commerce Clause of the United States Constitution, the State had no right to limit to any extent or to impose any conditions upon the right of an interstate pipe line company to make direct sales of gas within the state other than to impose such conditions as might be necessary to insure the safety of the public (R. 7-8, 20, 54, 58). Subsequent to the decision above referred to, appellant shifted its position to the extent that it now concedes that the State has power to regulate "rates and other local incidents" (Appellant's brief, p. 6).

This appellee takes the position that under the provisions of the Natural Gas Act as interpreted by this Court the State may, in the exercise of its now admitted regulatory powers, impose reasonable limitations upon the right of an interstate pipe line company to make direct sales within the state, and may exclude such company from direct sales to a particular local market or a particular customer where, after a full and fair hearing, it appears that such limitation or exclusion is the type of regulation required to protect the public interest. Appellee's argument in support of its position stated above constitutes Part II of this brief.

The arguments in this brief will be presented under the following headings and sub-headings:

PART I:

The determination of the Michigan Supreme Court in this case is not a "final judgment or decree" upon which an appeal can be based.

PART II:

Under the provisions of the Natural Gas Act as interpreted by this Court the State may, in the exercise of its now admitted regulatory powers, impose reasonable limitations upon the right of an interstate pipe line company to make direct sales within the state, and may exclude such company from direct sales to a particular local market or a particular customer where, after a full and fair hearing, it appears that such limitation or exclusion is the type of regulation required to protect the public interest.

1. Congress, by the provisions of the Natural Gas Act, has confirmed to the State full regulatory power over direct sales of gas within the state made by an interstate pipe line company.

2. The power to regulate so confirmed to the State includes the power to impose limitations or to exclude from a particular local market or a particular customer, where such limitation or exclusion is the type of regulation required to protect the public interest.

3. Limitation or exclusion incidental to such regulation does not constitute destruction of interstate commerce, nor does it offend against the Commerce Clause of the Constitution within the meaning of those terms as used in the line of cases relied upon by appellant.

4. Unless the power to limit or exclude in a proper case is held to be within the regulatory power of the State, an interstate pipe line company may raid at will the service area of another utility, thus destroying the comprehensive scheme of Federal and State regulation which it was the intent of Congress to provide.

ARGUMENT

PART I

THE DETERMINATION OF THE MICHIGAN SUPREME COURT IN THIS CASE IS NOT A "FINAL JUDGMENT OR DECREE" UPON WHICH AN APPEAL CAN BE BASED.

Appellant's contention as to jurisdiction of this appeal relies on the *same misconstruction* of the order of the Michigan Public Service Commission which Panhandle urged unsuccessfully in the Supreme Court of Michigan, which court affirmed the order and gave it an authoritative construction.

The Supreme Court of Michigan states:

> "Panhandle construes the order of the Michigan Public Service Commission as an absolute denial of the right of Panhandle to sell natural gas in this State direct to local consumers for their own consumption and use; in other words, that said order denies Panhandle a certificate of public convenience and necessity to sell natural gas direct to local consumers. *We do not so construe the order.* * * * * It leaves the door open for a hearing before the Michigan Public Service Commission as to whether or not public convenience and necessity requires the granting of such a certificate to Panhandle, *after a proper hearing on that question.*" (Italics ours.)

Accordingly the only "right" of Panhandle which it now asks the Supreme Court to sustain is its "right" to refuse to obey the express requirement of the Michigan statute (Act 69, Section 2 of the Public Act of 1929 of Michigan) which provides that no public utility shall begin or carry on any "local business", such as Panhandle wishes to engage in, "until such public utility shall first

obtain from the Commission a certificate that public convenience and necessity requires or will require such construction, operation, service or extension." (See Appendix A for text of applicable sections of Act 69, cited above.)

If Panhandle had applied for such a certificate then the Commission would have been obligated to consider all legal issues and to take evidence as to all facts bearing upon the proper exercise of its statutory powers, and to make a decision which might be either—

(1) To grant an unqualified certificate, or

(2) To grant a certificate on conditions (such as submitting to regulation of rates or service) or

(3) To deny a certificate, on the basis of findings of fact and conclusions of law laid down by the Commission.

Panhandle would have had no complaint against the first alternative decision; nor, probably against the second alternative in the light of the overruling of its original claim to immunity from State regulation, by the Supreme Court of the United States in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U. S. 507. But, after either decision any aggrieved person would have had the right to a judicial review of the Commission action, upon an adequate record of the facts relied upon to support the order of the Commission.

Similarly if, in the third alternative, the certificate had been denied, then, an adequate record would have been available for judicial review.

It is, however, the effort of Panhandle by the present premature appeal to induce this Court to hold that under no circumstances and upon no showing of public interest could

the Michigan Commission lawfully deny an unconditional certificate to Panhandle . . . and that therefore Panhandle is not obligated to apply for a certificate.

Counsel for Panhandle must concede, after their defeat in the Indiana case, *supra*, that the Michigan Commission has complete and exclusive authority to regulate the rates and services of their direct sales. Whether this "local business" is still, in legal contemplation, a part of interstate commerce (but subject to state regulation), or a part of intrastate commerce, may not be decisive as to whether a certificate should be granted or denied. But, how can *this issue of fact* be determined and legal conclusions be made except upon application for a certificate and a hearing thereon?

It is certainly not the denial of a constitutional right to require anyone asserting it to apply for a hearing upon his assertion of his right. An interstate utility cannot, under cover of "interstate commerce", assert a "constitutional right" to refuse to submit to any determination of whether it is not in fact engaging in intrastate commerce.

This present "constitutional" claim of the appellant, Panhandle, is peculiarly lacking in substantial merit, because it has been already held invalid by this Court, against all the contentions which Panhandle would now advance, in the former appeal of Panhandle itself, in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra*, where this Court held:

> "Broadly the question is whether Indiana has power to regulate sales of natural gas made by an interstate pipe line carrier direct to industrial consumers in Indiana. More narrowly we are asked to decide whether the commerce clause, Const. Art. 1, Sec. 8, by its own force forbids the appellee, public service commission, to require appellant to

file tariffs, rules and regulations, annual reports, etc., *as steps in a comprehensive plan of regulation preliminary to possible exercise of jurisdiction over rates and service in such sales.*[1]'" (pp. 508-9) (Italics ours.)

The footnote (1) to the above quotation adds: "The Commission is authorized to take these steps by Indiana statutes creating the State's regulatory scheme for public utilities. Burns' Ind. Stat. An. Sec. 5-4-101 *et seq.*"

The Michigan statute not only "authorizes" an application to the Commission as a *preliminary step*, but *requires* the utility in this manner to bring its project to the attention of the Commission, and requires the Commission to give it due consideration. (Sections 2, 3 and 5 of Act 69, P. A. 1929, M. S. A. 22.142 *et seq.*, Compiled Laws, 1948, 460.502 *et seq.*)

Thus, by statute, it is made a matter of administrative routine for a utility to file, and for the Commission to consider, an application for a certificate, as a preliminary step in the exercise of what this Court has expressly held to be a valid power of state regulation. Why is Panhandle challenging the validity of this incidental requirement of a valid law, which is necessary for its orderly administration? The obvious motive for this appeal is the desire for an advance opinion from the Supreme Court which might aid Panhandle to obstruct effective regulation of its direct sales by the Michigan Commission. The appeal is a safe gamble, because even if this Court rules against Panhandle now, all of the utility's objections to any specific regulation can be presented again to this Court in a future appeal from any ultimate, adverse decision of the Commission—on the ground that it violates in some manner a constitutional right to "due process of law".

This Court in the present appeal cannot decide that Panhandle is or is not entitled to a certificate. It is only being asked to make the unprecedented ruling that a state law cannot require a utility company, which is subject to state regulation, to apply for a certificate, in order to inaugurate the statutory procedure of regulation.

The cases cited by counsel for appellant have no application to the present issue. The rulings in such cases as *Buck v. Kuykendall*, 267 U. S. 307, and *Hood & Sons v. DuMond*, 336 U. S. 525, are to the effect that the state cannot absolutely prohibit a company engaged in interstate commerce from competing with either interstate or intrastate companies. Whether this rule would prevent a state from enforcing a policy against duplication of a service which, in the public interest, should be a regulated monopoly, need not be debated here. Even if the Michigan Commission exercised its statutory authority to deny a certificate to Panhandle to serve a customer in a market already served by another utility, it is clear that the Commission would not, and could not, prohibit Panhandle from serving many other customers not so situated. The Michigan statute only requires (Sec. 2, Act 69, *supra*) the obtaining of a certificate as a prerequisite to serving customers "in any municipality in this state wherein any other utility or agency is then engaged in such local business and rendering the same sort of service."

Thus, it is plain that, if there is to be any regulation of competition in the grant, or limitation, or denial of a certificate, the statute does not contemplate nor authorize the prohibition of competition by an interstate company *as such*. It only authorizes the application of rules of competition applying alike to intrastate and interstate companies. This is clearly within the necessary scope of state regulatory power. That regulatory power has been sus-

tained by this Court in unequivocal language. Whether direct sales be regarded as sales in interstate commerce or in intrastate commerce is immaterial. This Court has held directly on this point:

> "The controlling issues therefore are two: (1) Has Congress, by enacting the Natural Gas Act, 52 Stat. 821, 15 U. S. C. Sec. 717, in effect forbidden the States to regulate such sales as those appellant makes directly to industrial consumers; (2) if not, are those sales of such a nature, as related to the *Cooley* formula, that the commerce clause of its own force forbids the States to act.
>
> "We think there can be no doubt of the answer to be given to each of these questions, namely, that *the States are competent to regulate the sales*" * * * (pp. 513-14).
>
> 'The act, though extending federal regulation, had no purpose or effect to cut down State power. On the contrary, perhaps *its primary purpose was to aid in making State regulation effective*, by adding the weight of Federal regulation to supplement and reinforce it in the gap created by prior decisions." (Italics ours.) *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Commission of Indiana, supra* (p. 517).

There is not a word in the above opinion qualifying or limiting the State power of regulating sales by an interstate company as any less than its power of regulating sales by an intrastate company. Panhandle is bringing billions of cubic feet of gas into Michigan and is selling it for resale, free from any Michigan regulation; and this Court has made it plain in the above opinion that there will be no "destruction" or prohibition of interstate commerce if the State through its Commission, in regulating direct sales of some of Panhandle's gas, exercises "the power

to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests" (p. 523).

How can this Court determine whether the Michigan Commission will impose "terms reasonably related to the necessity of protecting local interests" before the Commission has had any opportunity to impose any terms at all?

The lack of finality in the present decision of the Supreme Court of Michigan is even more evident than in the case of *Republic Natural Gas Company v. Oklahoma*, 334 U. S. 62, 92 L. Ed. 1212, where this Court dismissed the appeal for lack of "finality" in the state court's decision. In that case the state Commission in effect forbade Republic to take natural gas from its own wells without accepting ratable amounts of gas from wells of another owner in the same field. The Commission's order further provided that if the parties could not agree on the terms at which Republic would market the gas of the second owner, the Commission would itself determine those questions. In that case this Court said:

> "This prerequisite for the exercise of the appellate powers of this court is especially pertinent when a constitutional barrier is asserted against a state court's decision on matters peculiarly of local concern. * * * Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up. * * * One thing is clear. The considerations that determine finality are not abstractions, but have reference to very real interests, not merely those of the immediate parties but more particularly those that pertain to the smooth functioning of our judicial system. * * * Appellant, of course, has the burden of af-

> firmatively establishing this court's jurisdiction. The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction." (67-71)

In the Republic Gas Company case, as in this case, if further proceedings before the Commission resulted in an order satisfactory to the appellant, no appeal at all would result. On this point the opinion of the Court, by Mr. Justice Frankfurter, held:

> "A profitable rate in the case before us might well satisfy the losing party to acquiesce in the disposition of the earlier issue. It is, of course, not our province to discourage appeals. But for the soundest of reasons we ought not to pass on constitutional issues before they have reached a definitive stop." (71)

The opinion of the court also pointed out that until final action by the Commission, it could not be determined what questions, if any, might be raised on appeal:

> "It is that the matters left open may generate additional federal questions. This brings into vivid relevance the policy against fragmentary review. * * * This potentiality of additional federal questions arising out of the same controversy has led this court to find want of the necessary finality of adjudicated constitutional issues in condemnation decrees before valuation has been made. Like considerations are relevant here." (71-72)

Mr. Justice Douglas, in his concurring opinion in the Republic Gas Company case, likewise pointed out:

> "For the single constitutional question necessary for decision will not be isolated until the precise pinch of the order on the appellant is known. It will not be known in the present case at least, until

> the appellant elects or is required (1) to shut down, (2) to become a carrier of the Peerless Gas, or (3) to purchase it. * * * The fact that each would raise only questions of due process under the Fourteenth Amendment does not mean that the questions are identical. Even when reasonableness is the test, judges have developed great contrariety of opinions. The point is that today the variables are presented only in the abstract, tomorrow the facts will be known when the precise impact of the order on appellant will be determined. Thus to me the policy against premature constitutional adjudication precludes us from saying the judgment in the present case is 'final.'" (73-74)

If this Court entertains the present appeal, regardless of its outcome further proceedings before the Commission will be necessary for the exercise of the Commission's conceded jurisdiction to regulate service and fix rates for the sales in question. Such further proceedings would probably result in another appeal on constitutional issues. Thus, the present appeal must be regarded as that "fragmentary review" which the requirement of finality is intended to avoid. The following language of this Court in dismissing the appeal in *Laclede Gaslight Co. v. Public Service Commission of Missouri*, 304 U. S. 398, 82 L. Ed. 1422, is clearly applicable to this case:

> "* * * the direction of the court for remand to the Commission for further examination of the questions stated apparently leaves in abeyance the final determination of the validity of the rate order and may result, as the Commission states, in action which may constitute the basis of another appeal." (400)

PART II

UNDER THE PROVISIONS OF THE NATURAL GAS ACT AS INTERPRETED BY THIS COURT THE STATE MAY, IN THE EXERCISE OF ITS NOW ADMITTED REGULATORY POWERS, IMPOSE REASONABLE LIMITATIONS UPON THE RIGHT OF AN INTERSTATE PIPE LINE COMPANY TO MAKE DIRECT SALES WITHIN THE STATE, AND MAY EXCLUDE SUCH COMPANY FROM DIRECT SALES TO A PARTICULAR LOCAL MARKET OR A PARTICULAR CUSTOMER WHERE, AFTER A FULL AND FAIR HEARING, IT APPEARS THAT SUCH LIMITATION OR EXCLUSION IS THE TYPE OF REGULATION REQUIRED TO PROTECT THE PUBLIC INTEREST.

In its decision in *Panhandle v. Indiana Commission, supra,* this Court had to consider specifically the question of a state's regulatory power over direct sales of natural gas to a consumer by an interstate pipe line company. It there stated definitely that such sales were a part of interstate commerce but that they were nevertheless subject to state regulatory power. In a later case, *Federal Power Commission v. East Ohio Gas Co.* (decided January 9, 1950), 338 U. S. 464, 94 L. Ed. 213, the Court's reasoning raises some doubt as to whether such a sale as was contemplated in this case is a part of interstate commerce. In this later case the Court returned to its rulings in earlier cases and held that interstate commerce ceases when the gas is taken from the interstate transmission lines and pressure reduced preliminary to delivery to consumers. Under this ruling it seems fairly clear that the service to be rendered the Ford Motor Company under the proposed contract would lose its character as interstate commerce. (See Statement of Fact, this brief p. 4.)

We feel, however, that the answer to the question involved in this appeal should be the same, regardless of whether the direct sale at issue in this case is to be re-

garded as intrastate commerce or as interstate commerce. If intrastate commerce, as held by the Michigan Commission (R. 28), it is clearly subject to full regulation by the State. If held to be interstate commerce, we believe the same conclusion should be reached for the reasons which we will now proceed to consider.

1.

Congress, by the provisions of the Natural Gas Act, has confirmed to the State full regulatory power over direct sales of gas within the state made by an interstate pipe line company.

At the outset it is important to keep in mind that we are not dealing here with a subject matter upon which Congress has not acted. Congress has acted by the passage of the Natural Gas Act, 52 Stat. 821, c 556, 15 U. S. C. A., §717, 4 F. C. A., Title 15 §717 (For text of applicable sections, see Appendix A, p. 35). In so doing, it exercised its "undoubted power to define the distribution of power over interstate commerce." *Panhandle v. Indiana Public Service Commission, supra.* This Court in that case held:

> "The policy which we think Congress has clearly delineated for permitting and supporting state regulation removed any necessity for determining the effect of the commerce clause independent of action by Congress and taken as operative in its silence." (524)

In this respect the case at bar presents exactly the same situation. As to the extent and effect of the action thus taken by Congress, this Court, in the same case, says:

> "The Natural Gas Act, therefore, was not merely ineffective to exclude the sales now in question from state control. Rather both its policy and its terms confirm that control. More than 'silence'

> of Congress is involved. The declaration, though not identical in terms with the one made by the McCarran Act (59 Stat. 33, c 20, 15 U. S. C. A. 1011) concerning continued state regulation of the insurance business, is in effect equally clear in view of the Act's historical setting, legislative history and objects to show intention for the states to continue with regulation where Congress has not expressly taken over." (521)

The McCarran Act cited in the Court's opinion quoted above, relating to state control of insurance business, provides that

> "* * * silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states (1011).
>
> "The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business. No act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance. * * *" (1012)

This declaration certainly confirms to the State full power of regulation over the business of insurance. The purpose of the Natural Gas Act to confirm to the State full power of regulation over direct sales of gas in interstate commerce is, we submit, equally clear. This Court has, in effect, so held in the Indiana case *supra*.

2.

The power to regulate so confirmed to the State includes the power to impose limitations or to exclude from a particular local market or a particular customer, where such limitation or exclusion is the type of regulation required to protect the public interest.

The majority of the Michigan Supreme Court in the case in which this appeal is taken held that the decision of this Court in the Indiana case, *supra*, justified the conclusion that the regulatory powers confirmed to the State by the Natural Gas Act included the power to exclude in a proper case. We are of the opinion that such an interpretation of that opinion is sound and constitutes the only interpretation that is consistent with the language and reasoning of the Court.

It is to be noted that in the Indiana case *supra* this Court referred to "state control" of direct sales, not just "regulation of rates and service" (521).

Section 1 of the Natural Gas Act provides:

> "The provisions of this Chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption * * * but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution. * * *"

This Act assigns to the Federal Commission control of those phases of interstate commerce in natural gas which are of paramount national interest. As construed by this Court, it assigns to the states control over all those phases which are of paramount local interest, including direct sales to consumers, in which the Court said "the national

interest is largely illusory." This Court said that the Act should be interpreted so that the Federal Commission's control in its sphere should be both "comprehensive and effective." The Court likewise said that the Act should be interpreted so that the states' control in their sphere should be just as "comprehensive and effective." That is clear from the following statements by the Court:

> "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the Federal and State regulatory agencies. *It does not contemplate ineffective regulation at either level.* We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme * * *. The scheme was one of cooperative action between Federal and State agencies. It could accomplish neither that protective aim nor the *comprehensive and effective dual regulation Congress had in mind*, if those companies could divert at will all or the cream of their business to unregulated industrial uses." (520-521) (Italics ours.)

The interpretation by the Michigan Supreme Court of this Court's decision in the Indiana case constitutes no departure from the principles announced by this Court in other decisions affecting a state's regulatory power over interstate commerce. There is nothing novel about the proposition that the power to regulate includes the power to exclude in cases where exclusion is the type of regulation required by the public interest. This is true of the Federal power to regulate interstate business, and it is likewise true of the state's power to regulate those phases of interstate business which are of paramount local interest. This Court has repeatedly so held. The Federal power over interstate commerce is prescribed by the Constitution as the power to "regulate." It is a "plenary power,"

(*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23) and as such includes the power to prohibit.

Mr. Justice Holmes' famous dissenting opinion in the first Child Labor Case (*Hammer v. Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101) became the law of the land by its later unanimous acceptance by this Court. Mr. Justice Holmes said:

> "It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulations may prohibit any part of such commerce that Congress sees fit to prohibit." (277-278).

Mr. Justice Holmes' view was later unanimously adopted by this Court in *United States v. Darby*, 312 U. S. 100, 85 L. Ed. 609, in which Mr. Justice Stone said:

> "The power to regulate commerce is the power 'to prescribe the rule by which commerce is governed.' It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it." (113)

To the same extent, a state's power to regulate that which is properly a subject of its regulation must include the power to prohibit in a case where prohibition is necessary to the protection of the public interest, for otherwise the whole regulatory process might be nullified and destroyed.

The power to regulate utilities is a part of a state's police power, which includes many matters and many purposes beyond the mere health, safety and morals of the public.

Sligh v. Kirkwood, 237 U. S. 52, 59 L. Ed. 835:

> "It (the state's police power) embraces regulation designed to promote public convenience and the general prosperity or welfare as well as that specifically intended to promote the public safety or the public health." (59)

In *Gilman v. City of Philadelphia*, 3 Wall. 713, 18 L. Ed. 96, the Court held a state had power to authorize a highway bridge over a navigable river which would bar both interstate and intrastate traffic on the river, where the local interest in highway traffic was properly held to be paramount. The court said that within the jurisdiction of the state's control "the reserved power of the state is plenary and its exercise in good faith cannot be made the subject of review in this court." In *Milk Control Board v. Eisenberg*, 306 U. S. 346, 83 L. Ed. 752, the court upheld application to an interstate shipper of milk of a state statute requiring all milk dealers to be licensed and bonded and prescribing the prices at which they could purchase milk and excluding from the state's market *all* dealers who did not comply with such regulations. See also *Bradley v. Ohio Commission*, 289 U. S. 92, 77 L. Ed. 1053; *Thompson v. McDonald*, 305 U. S. 263, 83 L. Ed. 164; *Parker v. Brown*, 317 U. S. 341.

In *Robertson v. California*, 328 U. S. 440, 90 L. Ed. 1366, the court upheld the application to interstate insurance companies of a California law forbidding insurance business in the state to companies operating on the assessment plan. The court said:

> "*Not the mere fact or form of licensing, but what the license stands for by way of regulation is important. So also, it is not simply the fact of prohibition, but what is forbidden and for the protection of what interest, that is determinative.* For the commerce clause is not a guaranty of the

> right to import into a state whatever one may please, absent a prohibition by Congress regardless of the effects of the importation upon the local community. * * * *Exclusion there is, but it is exclusion of what the state has the power to keep out, until Congress speaks otherwise.*" (Italics ours.) (458-459)

We refer the court to two cases on the control of production of gas and oil by a producing state, in each of which cases this court had to consider the effects of such control upon interstate commerce: *Champlin Refining Co. v. Oklahoma Corporation Commission,* 286 U. S. 210, 76 L. Ed. 1062, and *Cities Service Gas Co. v. Peerless Oil & Gas Co.* (No. 153, decided December 11, 1950), 330 U. S. 179, 95 L. Ed. Advance Opinions 156. In both of these cases various owners of wells in a particular field served by a pipe line (such owners including the interstate carrier itself) were competing to furnish gas or oil to be transported in interstate as well as intrastate commerce. In both cases this Court upheld the action of the Oklahoma Commission in determining the wells to be served by the pipe line and fixing the proportions in which the competing owners should participate and forbidding any transportation, interstate as well as intrastate, unless in accordance with its order. In the Champlin case the State Commission went further and restricted the movement of oil to 6% of the capacity of the wells, thereby excluding from interstate commerce 94% of the well capacity of the field. The interstate carrier unsuccessfully attacked these orders as being violative of the Commerce Clause of the Constitution. In the Cities Service case, *supra,* this Court held that:

> "* * *orders of a state corporation commission, fixing the minimum wellhead price of all gas taken from one field and specifically directing a producer in this field, which also operates an interstate gas

pipeline system, to take gas ratably from another producer in the same field at such price, do not violate the commerce clause, since a state is justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources, * * *." (Headnote 9, p. 157).

These two Oklahoma cases constitute direct holdings that a state does have power to limit the amount of gas and oil which can move from fields in a state into interstate commerce and can dictate which producers among competing producers may furnish gas or oil for such interstate movement. This being so, there is no reason why a state at the marketing end of the pipe line should not determine which of competing utilities should furnish gas for a particular local market even though one may be the interstate carrier itself, as was true in both the Oklahoma cases. In these cases this court recognized the paramount interest of the state in the sound economic and orderly regulation of the production of gas and oil for both interstate and intrastate commerce. *Certainly the marketing state has just as vital an interest in the sound economic and orderly regulation of utility service in its local markets.* To say that the Oklahoma Commission's orders did not involve a prohibition of interstate commerce is to distort the meaning of the word out of all reason. It prohibited the utilization of 94% of the capacity of the field for either interstate or intrastate commerce. This is prohibition of the most direct type, but it was held not to violate the Commerce Clause because it did not discriminate between interstate and intrastate commerce and was reasonably adapted to protect the public interest in a matter of paramount local concern.

Like the Michigan legislation in question in this case, the state legislation in all of these cases cited above applied equally to interstate and intrastate companies. The court

held there was, therefore, no discrimination and that the undoubted effect on interstate commerce, although prohibitory in character, was merely incidental to a proper regulation by the state of matters of paramount local interest. The Michigan legislation (Act 69, P. A. 1929) is not aimed at interstate commerce. Nor does it discriminate against it. It does not hinder nor forbid the importation of natural gas into the state. It merely says that interstate gas companies, like Michigan gas companies, cannot raid the market of a local utility unless such service is in the public interest. This court said in the Robertson case, *supra*, the State of California could prohibit interstate insurance companies from competing in its insurance market unless they complied with requirements applicable to intrastate companies. Why, then, can not the State of Michigan prohibit an interstate gas company from competing in its local markets except on the basis which it applies to its own utilities? The effect on interstate commerce in the one case is just as indirect and incidental as in the other. These cases clearly hold that a state's power to regulate local business which is a part of interstate commerce includes the power to exclude where exclusion is a reasonable type of regulation.

3.

Limitation or exclusion incidental to such regulation does not constitute destruction of interstate commerce, nor does it offend against the Commerce Clause of the Constitution within the meaning of those terms as used in the line of cases relied upon by Appellant.

We turn now to a consideration of the cases cited in appellant's brief (pages 10, 14) as authority for its contention that the Michigan legislation in question here violates the Commerce Clause. This Court has decided many cases in which it has invalidated state regulation because

it violated the Commerce Clause. In so doing it has formulated certain principles by which it may be determined what regulation is outside the scope of state authority. The Court has drawn a dividing line between those aspects of interstate commerce relating to transportation, *as such*, across state lines and the incidents of a local business which constitutes a part of interstate commerce although the paramount interest is local. In the first place, this Court has always held that state regulation cannot extend to matters in which the national interest is paramount over the state interest. In the second place, even though the state action relates to a matter of paramount local interest, the state's regulation must not be such as to discriminate or raise an embargo against interstate commerce. As recently as December 11, 1950, this Court stated the restrictions on state authority in its opinion in *Cities Service Co. v. Peerless Co., supra,* as follows:

> "The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions." (95 L. Ed. Advance Opinions 161)

The Michigan legislation in question here meets these tests perfectly. Since this Court's decision in *Panhandle v. Indiana Commission, supra,* there can be no doubt that regulation of direct sales by interstate pipe line companies relates to a matter of paramount local interest. The Michigan statute certainly does not discriminate against interstate commerce or erect an embargo against the importation of natural gas into this state. Appellant has at all times since the entry of the order here com-

plained of imported natural gas into Michigan, to the full capacity of its transmission lines. It is common knowledge that the Michigan demand has greatly exceeded Panhandle's ability to supply. The order of the Commission in this case certainly has had but a negligible effect, if any, upon appellant's interstate business.

The possibility of some decrease in such commerce was held by this Court not to invalidate state regulation in *Parker v. Brown, supra, Cities Service v. Peerless, supra, Champlin Refining Co. v. Oklahoma, supra, Robertson v. California, supra,* and *Milk Board v. Eisenberg, supra.* On the other hand, in all of the cases cited by the appellant, the state regulation was invalidated either because it sought to regulate some matter of paramount national interest or because the state sought to protect a local interest by discriminating or erecting a barrier against interstate commerce.

This Court has always held that the "control or restriction of the movement of traffic interstate" is a matter of paramount national interest and outside state jurisdiction. In the following cases cited by appellant the state regulation was struck down because of this character:

Crutcher v. Kentucky, 141 U. S. 47;
Barrett v. New York, 232 U. S. 14 (1914);
Sault Ste. Marie v. International Transit Co. 234 U. S. 333 (1914);
Mayor of Vidalia v. McNeely, 274 U. S. 676 (1927);
Buck v. Kuykendall, 267 U. S. 307 (1925);
Bush & Sons v. Maloy, 267 U. S. 317 (1925);
Allen v. Galveston Truck Line Corporation, 289 U. S. 708 (1933);
Southern Pacific Co. v. Arizona, 325 U. S. 761, 89 L. Ed. 1915 (1945).

In the Southern Pacific-Arizona case the state attempted to regulate the length of trains moving in interstate commerce. In the Buck, Bush and Allen cases the state sought to determine who should and who should not engage in interstate commerce within the state. In the Crutcher, Barrett, Sault Ste. Marie and Vidalia cases the local authorities sought to require the securing of a license before engaging in commerce into or out of the state.

In the following cases relied upon by the appellant the state asserted the right to restrict or bar the movement of commodities into or out of the state for the purposes stated below:

West v. Kansas Natural Gas Co., 221 U. S. 229 (1911);

Baldwin v. Seelig, 294 U. S. 511, 79 L. Ed. 1032 (1935);

Hood & Sons v. DuMond, 336 U. S. 525 (1949);

Dean Milk Co. v. Madison, 340 U. S. 349 (decided Jan. 15, 1951).

In the West case Oklahoma attempted to bar the movement of natural gas out of the state to preserve it for local use. In the Baldwin case New York attempted to prevent importation of milk from an adjoining state, where production costs were lower, in order to preserve the local market for New York producers. In the Dean case Madison attempted to exclude all milk produced outside the state by limiting the local market to milk producers within twenty-five miles of the city. In the Hood case New York denied a license to an outstate purchaser of milk to keep the New York product for local New York markets. In its opinion in the Hood case this court said:

> "Here the challenge is only to a denial of facilities for interstate commerce upon *the sole and*

> *specific ground* that it will subject others to competition and take supplies needed locally, an end, as we have shown, always held to be precluded by the Commerce Clause." (542) (Italics ours.)

Later in its opinion in *Cities Service Co. v. Peerless Co., supra*, this court said re the Hood case:

> "The vice in the regulation invalidated by Hood was *solely* that it denied facilities to a company in interstate commerce on the articulated ground that such facilities would divert milk supplies needed by local consumers; in other words, the regulation discriminated against interstate commerce." (162) (Italics ours.)

We have gone more into detail in an analysis of appellant's authorities than we would otherwise have done because the conclusion drawn from them is both erroneous and confused. That conclusion (page 14, appellant's brief) is, "it is fundamental that a state may not exclude interstate commerce where either the purpose or the effect is to protect local business from competition." There is no magic in a formula of words like "exclude" or "competition" but, as this statement clearly shows, there may be confusion in such a formula. *The appellant confuses the purpose of state regulation with its indirect effect.*

We do not claim that a state can "exclude interstate commerce" if that is the purpose of the regulation. Nor do we claim that a state can regulate interstate competition if that is its purpose. But if some exclusion or some restriction of competition is merely the "impact on interstate commerce" of state regulation to "safeguard an obvious state interest," the regulation will not fail just because of that impact.

In the Cities Service case, *supra*, Oklahoma determined which well owners among many competitors, *including the interstate carrier*, could furnish gas for interstate movement. In *Champlin v. Oklahoma*, *supra*, the state restricted interstate movement of oil from a field to 6% of the well capacity, although the interstate carrier was one of the well owners. In neither case was the regulation of competition or the restriction of interstate commerce the purpose of the regulation. Those results flowed as an indirect consequence of regulation which this Court found was reasonably adapted to protect a proper state interest. This Court held the purpose should not fail merely because of those indirect effects upon interstate commerce.

4.

Unless the power to limit or exclude in a proper case is held to be within the regulatory power of the State, an interstate pipe line company may raid at will the service area of another utility, thus destroying the comprehensive scheme of Federal and State regulation which it was the intent of Congress to provide.

It is important to understand clearly just what results would follow from appellant's contention in this regard. For the purpose of this argument we may admit that Congress could have given the Federal Power Commission power to permit or forbid direct sales by interstate pipe lines in competition with local utilities. That it did not do so is clear. If appellant is correct, the states likewise do not have such power.

If regulation is to be effective, someone must decide whether an interstate pipe line company may compete for all or any part it may desire of the market of the local utility. In the absence of any regulatory authority, the pipe line company could, as the Courts have said, skim off

the cream of the local distribution market. We submit that this Court in the Indiana case, *supra,* clearly foresaw the result of such a situation when it said that:

> "* * * the State's regulatory system would be crippled and the efforts of the Indiana Commission seriously hampered in protecting the interests of other classes of users equally if not more important." (522)

What interests and which users the Court felt were to be protected through state control is clearly shown by the Court's official footnote to the quotation above, which reads as follows:

> "Over 38 per cent of the gross revenues of the local Indiana utilities from the sale of gas is derived from service to the approximately 250 industrial consumers served by them. If service to any substantial number of the industrial users were to be taken over by appellant, the local utitlities not only would suffer great losses in revenue, but would be unable to dispense with more than a trivial percentage of their plant properties. The resultant increase in unit cost of gas would lead necessarily to increased rates for the consumers served by the local companies." (521)

If the Court's statement of the purpose of the State's power means anything, it means that the state's power over such direct sales is sufficient to prevent its regulatory system from being crippled. That regulatory system is predicated almost entirely on local gas utility service operated as a legal regulated monopoly. The rate structure of appellee, Michigan Consolidated Gas Company, was prescribed by the Michigan Public Service Commission on the assumption that that company would enjoy the large volume operation made possible by serving the large indus-

trial market as well as the domestic consumers. If Panhandle usurped that large consumer market, the entire rate structure would collapse. Appellant says, however, that by virtue of the Commerce Clause of the United States Constitution, its right to invade the local market cannot be questioned, that the State can do nothing to prevent it. We submit that the State does not stand in such a helpless position. We know of no decision of this Court placing such a construction on the Commerce Clause of the Constitution.

Appellant's argument on this point seems to be based on the assumption that in determining the question at issue the Michigan Commission would seek in some way to enhance the profits of this appellee by protecting it from competition. It is obvious that the Commission could accomplish no such result. This appellee under the law is entitled to earn only a fair return, and it is the duty of the Commission to see that it earns no more. The determination is one in which the public is vitally interested, in that if a local utility's revenues are decreased by taking away the profitable business of selling industrial gas which is handled at slight expense, the cost of gas to each individual householder and consumer will be substantially increased.

Appellant's proposed activities constitute an assault on the long standing public policy of the State, which aims to protect the public against needless and expensive duplication of facilities. Obviously the position of appellant is that, because it is an interstate carrier of natural gas, it is endowed with special privileges conferred by the Federal Constitution which entitles it to override and trample down the established public policy of the State in regulating public utility service. Appellant is here alleging that, solely because it is an interstate pipe line company, it has a right to do something forbidden to all others by the State of

Michigan—the right to enter the service area of another utility regardless of any prejudicial effect on the public interest.

As in the Indiana case, *supra*, Panhandle has again envisioned "an attractive gap" in the coordinated scheme of regulation. We believe this Court should again hold it to be a "mirage".

The decree of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX A

Statutory Provisions

Natural Gas Act (52 Stat. 821; 15 U. S. C. 717)

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Act 69, Public Acts of Michigan 1929 (M. S. A. 22.142 *et seq.*, Michigan 1948 Compiled Laws, Sec. 460.502 *et seq.*)

Sec. 2. No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other

utlility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension.

Sec. 3. Before any such certificate of convenience and necessity shall issue, the applicant therefor shall file a petition with the commission stating the name of the municipality or municipalities which it desires to serve and the kind of service which it proposes to render, and that the applicant has secured the necessary consent or franchise from such municipality or municipalities authorizing it to transact a local business.

Sec. 5. In determining the question of public convenience and necessity the commission shall take into consideration the service being rendered by the utility then serving such territory, the investment in such utility, the benefit, if any, to the public in the matter of rates and such other matters as shall be proper and equitable in determining whether or not public convenience and necessity requires the applying utility to serve the territory. * * *